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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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# No. 92

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JOHN E. MADDEN, JR., Executor of the Estate of John E. Madden, Deceased,

*Appellant,*

*vs.*

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky.

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APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

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## STATEMENT OPPOSING JURISDICTION.

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HARRY D. KREMER,
*Counsel for Appellee.*

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## STATEMENT OF APPELLEE UNDER RULE TWELVE, SECTION 3, SHOWING GROUNDS WHY SUPREME COURT SHOULD NOT ACCEPT JURISDICTION OF THIS APPEAL.

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Comes the appellee, Commonwealth of Kentucky, and states that the Supreme Court should not accept jurisdiction of this appeal for the following reasons, to-wit:

For many years prior to 1917 every Kentucky taxpayer was taxed at the same rate per $100 of valuation on all his "money in hand, notes, bonds, accounts and other credits (including bank deposits) under authority of Section 4019a-10.

Through a legislative investigation, the General Assembly of Kentucky discovered by 1917 that owing to the inade-

quacy of the State's tax statutes (1) nine-tenths of all the money on deposit in Kentucky banks, belonging to citizens of Kentucky and properly taxable to them was not being reported for taxation and therefore was escaping taxation, and (2) that a large part of money on deposit in banks regularly went into hiding immediately preceding each taxing date, and (3) because of such hiding of money prior to and on taxing dates, instead of keeping it on deposit in Kentucky banks, the basis for bank credit was greatly reduced just when it was sorely needed to move farm crops. For the facts supporting the above statement, see the opinion in *Commonwealth* v. *Madden's Exr.*, 265 Ky. 684, 97 S. W. (2d) 561.

To remedy the foregoing evils the General Assembly enacted Section 4019a-1, Kentucky Statutes, in 1917, making a separate taxing classification of deposits in Kentucky banks. That statute provides that any citizen of Kentucky might deposit his money in a Kentucky bank and have it taxed to the bank at a tax rate of only one-tenth of one per cent.

The effect of that enactment was that if a citizen of Kentucky should deposit his money in a Kentucky bank, where taxation of it would become a certainty and where the deposited money would become a basis for credit in making bank loans, the tax rate would be only one-tenth of one per cent, but if the taxpayer would choose to hide or conceal his money in some manner or would deposit it in a bank in a foreign state where Kentucky would not have any jurisdiction to assess the money to the bank and where it would probably escape taxation, and where the money would not become a basis for making bank loans in Kentucky, the taxation of money, whether on deposit in a foreign bank or not, would be made under the general statute, Section 4019a-10, at 50¢ on each $100.00.

## Federal Question Raised by Appellant.

Appellant contends that by putting bank deposits in Kentucky banks into a separate classification for taxation by enactment of Section 4019a-1; while money and credits (including bank deposits) not in Kentucky banks is taxed under another classification, provided for by Section 4019a-10, the General Assembly of Kentucky discriminated in violation of the privileges and immunities provision of the Federal Constitution and violated the Fourteenth Amendment.

The General Assembly of Kentucky had authority under Section 171 of the Kentucky Constitution to divide property into separate classes for taxation. Under that authority the General Assembly made a separate taxing classification of deposits in Kentucky banks and left other money which was hid from taxation, whether in foreign banks or otherwise secluded, to be taxed under the classification provided for by Section 4019a-10 of Kentucky Statutes.

Neither the Federal Constitution nor the Fourteenth Amendment was abridged by making a separate taxing classification of bank deposits in Kentucky banks.

The classification complained of was reasonable. There was no "clear or hostile discrimination". The decedent, Madden, had the choice of making himself a taxpayer under either one of the classifications. He chose to make himself a taxpayer under Section 4019a-10, provided Kentucky apprehended that he was the owner of money not reported for taxation.

Mr. Madden was not taxed because he had money on deposit in New York banks. He was taxed on the money on deposit because (1) he was a citizen of Kentucky and (2) the owner of the money.

The classification complained of was reasonable and neither arbitrary nor discriminating. Therefore, no con-

stitutional question has been raised by the attempted appeal to this Court. The rule is stated by *Cooley on Taxation*, Vol. 1, Section 334, p. 716:

> "Classification for taxation is not reviewable by the courts unless palpably arbitrary. It is no concern of the court whether the classification is the wisest or the best that could be made. The classification need not be 'reasonable and proper' according to the judgment of the reviewing judges, but the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, 'there must be enough reason for it to support an argument, even if the reason is unsound.'"

Appellant relies upon the decision of this Court in the case of *Colgate v. Harvey*, 296 U. S. 404, 426, *et seq.*, as sustaining his claim that this Court should take jurisdiction of this appeal.

This Court held in the *Colgate* v. *Harvey* case that it could not

> "find in the provision (Vermont Statute) any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan."

Contrary to the facts in *Colgate* v. *Harvey*, the facts in the instant case show that the General Assembly of Kentucky had at least three public purposes in mind when it made the taxing classification complained of.

We respectfully pray that this Court will decline to take jurisdiction of the appeal.

HARRY D. KREMER,
*Appellee's Solicitor.*